F. M. S.

(Original Civil Jurisdiction)

Thorne, Ag. C.J.

January 16, 1933.

CHOI WAI YING.....Plaintiff.

vs.

CHEONG WENG CHAN
CHEONG YOKE CHOY
CHEAH WAI YIN
KOK AH LING.....Defendants.

(Selangor Civil Suit No. 570 of 1932.)

Civil Procedure Code, 1918, *Section* 369 (*iii*)—*Security for Costs.*

The words "suit for money" in Section 369 (iii) of the Civil Procedure Code, 1918, mean a suit in which the main relief claimed is judgment for a sum of money, or one in which the result of the suit must be a money judgment.

An action by a wife against her husband and others claiming general damages in addition to restitution of conjugal rights, specific performance of the anti-nuptial contract and a declaration that the marriage between her husband and another woman is null and void, is not a "suit for money" within the meaning of Section 369 (iii), and therefore not a suit in which a wife as plaintiff should be ordered to give security for costs.

APPEAL from the decision of the Registrar.

E. D. Shearn for the defendants-appellants.

The Hon. Mr. S. Veerasamy for the plaintiff-respondent.

Cur. adv. vult.

Thorne, Acting C.J.:—In this case the defendants applied to the Registrar for an order under Section 369 (iii) of the Civil Procedure Code, that the plaintiff do within ten days furnish security for costs of this suit in the sum of $1000. The matter came before the Registrar, Mr. Worley, on the 5th of December who refused the order; the defendants thereupon preferred an appeal against this refusal.

Section 369 (iii) of the Civil Procedure Code reads as follows:—

> "On the application of any defendant in a suit for money in which the plaintiff is a woman the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within the Federated Malay States other than the property in suit."

It was argued for the appellants that this suit was a "suit for money" within the meaning of this section, and that as the respondent did not possess any immoveable property in the Federated Malay States, the Court had a discretion to grant or refuse the order that the respondent furnish security for costs.

It was, further contended that this suit was, for more than one reason, a proper one in which the discretion should be properly exercised in granting an order for security.

The first question for me to consider is whether or not this is a 'suit for money'. Section 369 comes to us from India, and is the same as the old Section 380. The present relevant Indian Section is Order 25 Rule 1, which has been amended, and now reads 'suit for the payment of money'.

I have been referred by counsel to a number of authorities upon the construction of the old Section in India, and I have examined the commentaries upon the Section. Stated shortly, the effect of these authorities, would appear to be that 'a suit for money' is a suit in which the main relief claimed is judgment for a sum of money, or one in which the result of the suit must be a money judgment.

An examination of the plaint in this case discloses the fact that the respondent is the wife of the first appellant; that prior to their marriage an anti-nuptial contract was made; the marriage was celebrated at Hong Kong on the 21st of November 1929; that the parties returned to Kuala Lumpur; that unhappy differences have arisen between the respondent and the first appellant; and that in more than one particular the appellants are alleged to have committed breaches of the anti-nuptial contract.

I wish to guard myself at this stage of the litigation against any expression of opinion upon the rights of the respondent's claim.

The prayer to the plaint is:—

(1) for an order for the restitution of conjugal rights;

(2) that a suitably furnished house be provided for the joint habitation of the plaintiff and the first appellant.

I pass over No. 3 and go on to No. 4 which seeks a declaration that the marriage between the first and the 4th appellants is null and void.

Now, quite clearly, none of these three prayers can result in a money judgment against the appellants or any of them. As to the third prayer, which is that the second appellant be ordered to invest in the name of the respondent the sum of $300,000 in house property in Kuala Lumpur, or in the alternative, for judgment against him for the sum of $300,000, Mr. Shearn urges that if the respondent is successful, there must necessarily be a money judgment against the second appellant.

Mr. Veerasamy for the respondent on the other hand urges that the respondent is seeking specific performance of the anti-nuptial contract alleged in paragraph 6 of the plaint, and particularly sub-paragraph (iv) of that paragraph. In this submission he exhibited greater ingenuity than did the draftsman of the plaint.

In my view, I am not bound by the literal wording of the prayer to the plaint in deciding this question,

and think that the proper course for me is to have regard to the substance of the respondent's claim and the relief to which she will probably be entitled if successful.

It seems to me that the respondent's case is that the parties to the anti-nuptial contract agreed that house property in Kuala Lumpur to the value of $300,000 should be settled on the respondent. If the respondent succeeds in establishing this contract and its breach, primarily, the order would be for specific performance of the contract, and for aught I know to the contrary, the parties may be possessed of real property in Kuala Lumpur of sufficient value to enable them to comply with the decree for specific performance without it being necessary to acquire any land in order to complete the settlement.

The respondent makes a claim for damages. This I assume to be a claim for damages for breach of one or more of the terms of the anti-nuptial contract. This claim is incidental or ancillary to the other prayers, and I confess I have very considerable difficulty in appreciating how the respondent can recover damages as ancillary to any of the preceding four prayers to the plaint. Mr. Shearn for the appellants did not press this matter for the reason, I assume, that he experienced the same difficulty as I did. I am of opinion, therefore, that the respondent's claim may be described as an action for restitution of conjugal rights with ancillary relief, for an order for specific performance of a contract, and for a declaration that the marriage between her husband and another woman is null and void. I hold that the suit is not a 'suit for money' within the meaning of Section 369 (iii) of the Civil Procedure Code, and that on this ground the appeal fails.

If I am wrong in this view, and the section has application to the case for the respondent, I think the Registrar was right in the exercise of his discretion in refusing to make any order. In the first place, this is an action by a wife against her husband. The respondent appears to be a native of Canton, who married the first appellant in Hong Kong, and is now living in Kuala Lumpur, at a considerable distance from her parents and the other members of her family. Primarily, therefore, it is a case in which the Court should be reluctant to order security for costs, since such an order might amount to a denial of justice to the respondent.

It is said that this Section was introduced in India, because there, a female cannot be imprisoned for debt. If that be the reason for its introduction in India, there would appear to be no similar reason for the existence of such a section in our Civil Procedure Code; but the legislature has seen fit to enact this, and it is the duty of the Courts loyally to give effect to its provisions.

This action arises, as I have said, out of an anti-nuptial contract, and so far as the respondent claims restitution of conjugal rights, the action was one which in England would be assigned to the Divorce Division, in which the general practice is that the husband furnishes security for the wife's costs. As between husband and wife in matters affecting their domestic relations, the provisions of this section are rather repugnant to the ideas of English lawyers, and it is therefore not easy to rid oneself of the accepted ideas in order to give effect to this section.

It is to be observed too that under Section 37 of the Divorce Enactment 1928, subject to the provisions of that Enactment, all proceedings thereunder are regulated by the Code of Civil Procedure, so that at least as between husbands and wives, to whom that Enactment applies, considerable difficulty may hereafter arise, and it is, perhaps, not out of place here that I should suggest that this is one of the sections of the Civil Procedure Code, the amendment or repeal of which might well be considered.

In my view the Registrar was correct in the exercise of his discretion to decline to make any order on this summons. The appeal will stand dismissed therefore with costs to be paid by the appellants to the respondent.

Appeal dismissed.

(Appellate Criminal Jurisdiction)

Gerahty, J.

January 25, 1933.

CHAN HOCK TING ..... **Appellant.**

vs.

PUBLIC PROSECUTOR ..... **Respondent.**

(Perak Magistrate's Criminal Appeal No. 90 of 1932)

Customs Enactment, 1923, Sections 111 (a) and 116 (ii)—Forfeiture of goods.

When a Magistrate finds under Section 111 (a) of the Customs Enactment, 1923, that there has been an importation of restricted goods contrary to the provisions of that section, but he is not satisfied that the accused was concerned in that importation, then such finding does not remove the taint from the goods themselves, but merely removes the personal liability of the accused. It is to meet such a case as this that section 116(ii) was enacted, conferring upon a Magistrate all such powers in regard to the forfeiture of goods as he might have exercised had some person been convicted of an offence in relation thereto.

J. Dunford-Wood for the appellant.

Raja Musa, Deputy Public Prosecutor, for the respondent.

Cur adv. vult.